SUPREME COURT OF THE UNITED STATES.

No. 15.

MORDECAI LEVY ET AL., PLAINTIFFS,

VERSUS

PETER McCARTEE.

ON A CERTIFICATE OF DIVISION IN OPINION OF THE JUDGES OF THE CIRCUIT COURT UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

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Circuit court of the United States for the southern district of New York, in the second circuit.

James Jackson, *ex dem.* Mordecai Levy, Elizabeth Levy, Chapman Levy, and Rosina his wife, Bella Hart, Bella Cohen, Rhinah Mordecai, Flora Levy, and Jacob Henry, *vs.* Peter McCartee.

This action of ejectment upon the demise of the above named lessors was tried at the October term of this court, eighteen hundred and twenty-eight, and a special verdict found therein, as follows, viz: Afterwards, that is to say, on the last Monday of October, in the year one thousand eight hundred and twenty-eight, at the city of New York, before the Honorable Smith Thompson, one of the Judges of the Supreme Court of the United States of America, and the Honorable Samuel R. Betts, district Judge of the southern district of New York, in the second circuit, came, as well the within named plaintiff as the within named defendant, by their respective attorneys within named, and the jurors of the jury whereof mention is above made being summoned, also come, to wit: John Pye, Joseph Davis, Charles Gordon, Daniel Hurst, Anthony Kerr, Gabriel Wisner, Dudley B. Fuller, Henry S. Brooks, John Lowden, Robert Kermit, George S. Gelston, and Daniel Dusenbury, who, to speak the truth of the matters above contained, being chosen, tried, and sworn, say, upon their oath, that the lease, entry, and ouster, were made and done as stated and set forth in the plaintiff's declaration.

not guilty, upon which issue was joined upon the foregoing facts agreed. Plaintiff moved the court for a judgment against the defendant for said sum of two thousand six hundred and fifteen dollars sixty-two and a half cents, the amount agreed upon, if plaintiff be entitled to recover. Before said motion for judgment, it occurred as questions, "whether by the will of said Britain Goodwin, said Elizabeth Goodwin had an absolute title to the personal estate of said Britain Goodwin, or only a life estate; and, also, whether said Jesse Goodwin, by said will, had a vested remainder that would come into possession on the death of said Elizabeth, or was said remainder void." On which questions, the opinions of the judges were opposed.

Whereupon, on motion of the plaintiff, by his counsel, that the points on which the disagreement hath happened may, during the term, be stated under the direction of the judges, and certified, under the seal of the court, to the Supreme Court, to be finally decided, it is ordered that the foregoing agreed facts and statement of this cause be certified, according to the request of the plaintiff, by his counsel, and the law in that case made and provided.

United States of America, Seventh Circuit and District of East Tennessee.

I, William C. Mynatt, clerk of the circuit court of the United States for the seventh circuit and district of East Tennessee, do hereby certify the foregoing to be truly copied from the records of this office.

Given under my hand and seal of office, at office in Knoxville, this sixth day of November, 1829.

[L. S.] WILLIAM C. MYNATT, *Clerk.*

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And the jurors aforesaid, upon their oath aforesaid, do further find, that, at the time of the commencement of this suit, to wit, on the twenty-second day of April, in the year one thousand eight hundred and twenty-eight, the said defendant, Peter McCartee, was in the possession of the lands and premises in question in this suit, known and described as a house and lot numbered forty-seven, fronting on Murray street, in the city of New York. And the jurors aforesaid, upon their oath aforesaid, do further find, that Philip Jacobs, late of the city of New York, on the sixth day of October, in the year one thousand eight hundred and eighteen, was seized in fee simple of the said premises in question, and on that day the said Philip Jacobs, being so seized thereof, and leaving no child born to him, the said Philip Jacobs, but his wife Elizabeth was then pregnant of a female child, which was born alive on the twenty-third day of January, in the year one thousand eight hundred and nineteen, which female child continued to live until the 5th day of April, in the year one thousand eight hundred and twenty-one, and then the said child died without issue. And the jurors aforesaid, upon their oath aforesaid, do further find, that the said Philip Jacobs was born in Germany, and that he came to the city of New York before the year one thousand seven hundred and seventy-two, where he resided in that year, and that he continued to reside there until his death. And the jurors aforesaid, upon their oath aforesaid, do further find, that the said Philip Jacobs had one brother only, and his name was Simon Jacobs, who was also born in Germany, but who went to England, and resided in London from the year one thousand seven hundred and sixty-five till his death, in the year one thousand eight hundred and seven; that said Simon Jacobs never came to America; that said Simon Jacobs had two sons, to wit, Jacob and Abraham; that the said son Jacob came from London to New York in the year one thousad eight hundred and eight, and remained at New York a short time, and then went to Canada, where he soon after died, having never been married; and the other son of said Simon Jacobs never was in America, and now resides in England: and the said Philip Jacobs also had a sister, who was born in Germany, and lived and died there, leaving several children, born and residing there. And the jurors aforesaid, upon their oath aforesaid, do further find, that the father and mother of the said Philip Jacobs were born in Germany, and they both died before the death of said Philip Jacobs. And the jurors aforesaid, upon their oath aforesaid, do further find, that Leipman Cohen was brother of the mother of the said Philip Jacobs; that the said Leipman Cohen, and his wife, were also born in Germany; that they had children, three sons, to wit, Philip, Moses, and Elias, and three daughters, Jane, Mary, and Catharine; that all the said children of Leipman Cohen were born in Germany; that said Leipman Cohen, with his said children, removed to England many years before the year one thousand and eight hundred and twenty-two, and continued to reside in England until his death. And the jurors aforesaid, upon their oath aforesaid, do further find, that the said Philip, son of Leipman Cohen, came from London to America, and resided in South Carolina from the year one thousand seven hundred and seventy-two until the year one thousand seven hundred and eighty-six, when he died without issue, having never been married. And the jurors aforesaid, on their oath aforesaid, do further find, that Moses Cohen, son of the said Leipman Cohen, came from London to the city of New York in the year one thousand seven hundred and seventy two; that in the same year the said Moses Cohen went to Charleston, in

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South Carolina, where he married Judith De Lyon; that he soon after removed to Savannah, in Georgia, and resided there from the year one thousand seven hundred and seventy-four, until his death, which occurred in the year one thousand seven hundred and ninety one; that the said Moses Cohen had two daughers of his said marriage, to wit, Rhina and Bella, who were born in Charleston or Savannah aforesaid, and the said Rhina is now forty-one years of age, and is the widow of Mordecai, and was such widow at the commencement of this suit; the said Bella Cohen is now forty years of age; and the said Rhina and Bella have resided within the United States of America ever since their birth. The said Bella Cohen has never been married. The said Rhina and Bella are now alive, and reside in Charleston aforesaid, and are the only children of said Moses Cohen, and are two lessors of the plaintiff in this suit. And the jurors aforesaid, upon their oath aforesaid, do further find, that Mary, one of the daughters of said Leipman Cohen, was lawfully married to Mordecai Levy, in London aforesaid, where she and her said husband continued to reside until their death; and they had of such marriage five children, to wit, one son named Emanuel, and four daughters, to wit, Jane, Bella, Hannah, and Flora, which children were all born in London aforesaid; and they all came to Charleston, in South Carolina, between the year one thousand seven hundred and eighty-eight and the year one thousand seven hundred and ninety-two. The said Bella Levy afterwards married Daniel Hart, and is now his widow, and resides in Charleston aforesaid. The said Hannah Levy is now the wife of Moses Davies, and resides in the city of New York. Said Flora Levy married Michael Emanuel before she came from London to Charleston; and she and her said husband both died in Charleston, in South Carolina, leaving their children there, to wit, Michael, Nathan, Simon, Joel, Charlotte, and another daughter, whose name is unknown. The children of said Flora by her said husband, Michael Emanuel, were all born in England. The said Charlotte, and the other daughter of Flora Emanuel, whose name is unknown, were never married, and they are both dead. And the jurors aforesaid, upon their oath aforesaid, do further find, that the said Emanuel Levy, the son of Mary and Mordecai Levy, died in the year one thousand eight hundred and sixteen, leaving lawful issue, to wit, a son named Mordecai Levy, one of the lessors of the plaintiff, now living in the State of South Carolina, a daughter, Flora, who married Chapman Levy, of South Carolina, and died in the year one thousand eight hundred and twenty-three, leaving a daughter named Flora, one of the lessors of the plaintiff, now living in South Carolina aforesaid, and six years old. Said Emanuel Levy also left another daughter, named Rosina, who was married to the said Chapman Levy after the death of her said sister Flora. The said Chapman Levy, and Rosina his wife, are two of the lessors of the plaintiff, and reside in the State of South Carolina aforesaid; and the said Rosina has died since the commencement of this suit, leaving an infant son of her said marriage, named Edward Anderson Levy; and the said Emanuel Levy also left a daughter named Elizabeth, who is now living, aged fifteen years, and is one of the lessors of the plaintiff, and resides in South Carolina aforesaid. All the said children of the said Emanuel Levy were born in Charleston aforesaid, and the said Chapman and all his children were born in South Carolina. And the jurors aforesaid, upon their oath aforesaid, do further find, that Catharine, one of the said daughters of Leipman Cohen, died unmarried and while an infant; that the son of said Leipman Cohen, named Elias, had children, and is dead; and that the said Elias, and his children, were born in Germany, and have never

been in America. And the jurors aforesaid, upon their oath aforesaid, do further find, that the said Leipman Cohen and his wife, and their children, and the said Philip Jacobs and his said brother Simon Jacobs, and their father and mother, were all natives of Germany, and were all Jews. And the jurors aforesaid, upon their oath aforesaid, do further find, that the said land and premises in question in this suit are of the value of more than two thousand dollars. And the jurors aforesaid, upon their oath aforesaid, do further find, that, on the seventh day of September, in the year one thousand eight hundred and eighteen, the said Philip Jacobs, being seized in fee simple of the said lands and premises, made his last will and testament, in writing, and signed, sealed, and published, and declared the same as and for his last will and testament, in the presence of three credible witnesses, who, at his request, and in his presence, and in the presence of each other, severally subscribed their names as witnesses thereto; that the said will remained unrevoked and uncancelled at the time of the death of the said Philip Jacobs; and which will and testament is in the words and figures following, to wit:

In the name of God, amen. I, Philip Jacobs, of the city of New York, in the State of New York, gentleman, being of sound disposing mind and memory, blessed be God for the same; but being far advanced in years, and mindful of the uncertainty of this mortal life, do make and publish this my last will and testament, in manner and form following, to wit: First, I commit my soul into the hands of Almighty God, my Creator, hoping, through the merits and atonement of Jesus Christ, to obtain everlasting life. Item—It is my will that all my just debts and funeral charges be paid as soon as conveniently may be after my decease. Item—It is my will that all the legacies hereinafter mentioned be paid out of my personal estate, and that my executors hereinafter named for that purpose turn the same, or as much as may be necessary, into cash, as soon as may be convenient after my decease. Item—I give to each of my godchildren, Mary Lownds and Sophia Maria Theresa Cook, the sum of two hundred dollars. Item—I give to the widow of my late godson Philip Hardenbrook, deceased, the sum of one hundred dollars. Item—I give to my goddaughter Mary Morrison the sum of one hundred dollars. Item—I give to Mrs. Browne, wife of Thomas Browne, and niece of my late wife, my portrait of my said wife. Item—I do give and bequeath unto each of my nephews, Joseph, Abraham, and Moses, sons of my late brother Simon Jacobs, deceased, late of the city of London, and to their heirs in case of their decease, the sum of two thousand dollars, lawful money of the United States of America. Item—I do give and bequeath unto each of the daughters of my sister Esther, now or lately residing in Dettleback, in Franconia, near Wearthburg, on the river Maine, in Germany, and to their heirs in case of their decease, the sum of two thousand dollars, lawful money as aforesaid. Item—I do give and bequeath unto my nephew Jacob Simpson, son of my said sister, and to his heirs in case of his decease, the sum of two thousand dollars, lawful money as aforesaid. Item—I give each of my executors, or such of them as shall undertake the execution of this my last will and testament, the sum of three hundred dollars, for their trouble in discharging the trust hereby reposed in them. Item—I do give and bequeath to the society for the relief of poor widows with small children, in the city of New York, the sum of one thousand dollars, lawful money as aforesaid. Item—I do give and bequeath unto the Orphan Asylum society, in the city of New York, the sum of two

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thousand dollars, lawful money as aforesaid, to be disposed of by them for the benevolent purposes for which they were incorporated; which said several legacies above mentioned, shall be paid by my executors within eighteen months next after my decease. Item—I do hereby give and bequeath to my beloved wife Elizabeth the sum of six thousand dollars, to be received by her in lieu of all dower to which she might be, by law, entitled out of my real estate, and also in lieu of all claims on her part under certain marriage articles duly executed previous to my intermarriage with her; and should the said Elizabeth be willing to receive the said sum of six thousand dollars in lieu of her dower, and of her claims under said articles, I do hereby direct, that, previous to payment thereof, by my said executors, the said Elizabeth do, in conjunction with my said executors, cancel the said marriage articles, and execute such release of her right to dower out of my real estate as counsel learned in the law may devise or advise; and it is further my will, that my said wife make her election to take under this my last will and testament, or under the said marriage articles, in thirty days after she may receive notice of this bequest, after my decease. Item—It is my will, that, if, at the time of my decease, there shall be any child of mine alive, that then all the rents and profits of my real estate shall be received by my executors hereinafter named, or the survivor or survivors of them; and be applied by him or them to the support, maintenance, and education of such child, until such child attain the age of twenty-one years, or intermarry; and if, from the yearly application of such rents and profits to the purposes aforesaid, there should be a surplus remaining, the said executors, or the survivor or survivors of them, shall, from time to time, in his or their discretion, invest the same in some safe stock, for the benefit of said child, to be paid over to such child at the age of twenty-one years, or on marriage, whichever event shall first take place; and that my said executors, or the survivor or survivors of them, receive for such their trouble and attention such sums as the law may allow. Item—After the payment of all legacies and other bequests contained in this my last will, I do hereby give, devise, and bequeath all the rest, residue, and remainder of my estate, real and personal, to the Orphan Asylum Society in the city of New York, to be applied to the charitable purposes for which said association was established; this bequest to take effect immediately after all other debts and legacies are paid, if I should leave no child at the time of my death, or, if I should leave a child, then, upon the death, intermarriage, or the attaining the age of twenty-one years by such child. Item—I do hereby devise and bequeath unto my said executors, or the survivor or the survivors of them, or such of them as may act in the premises, all my real estate, of whatsoever nature or kind the same may be, subject to the trusts aforesaid; and it is my will, that, whenever such child shall attain the age of twenty-one years or marry, that my real estate be sold by my said executors, or the survivor or survivors of them, or such of them as may act herein, and the one half of the proceeds thereof paid to my said child, if the said child shall attain the age of twenty-one years or marry. And lastly, I do nominate and appoint my worthy friends, Peter McCartee, Richard Cunningham, and John Anthon, all of the city of New York, Esqs., to be the executors of this my last will and testament. In witness whereof, I, the said Philip Jacobs, have hereunto set my hand and seal, the seventh day of September, one thousand eight hundred and eighteen.

[L. S.] PHILIP JACOBS.